Public Prosecutor v Mohd Radzi bin Abu Bakar

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–05 OF 2002(R)

AHMAD FAIRUZ PCA, ABDUL MALEK AHMAD FCJ AND GOPAL SRI RAM JCA

20 JULY 2005

Criminal Procedure — Appeal — Fact, finding of — Whether for appellate court to restore finding of trial judge based on evidence in record of appeal

Criminal Procedure — Appeal — Retrospective application — Pronouncement of common law by superior court after appeal filed but before offence was committed — Whether superior precedent applicable retrospectively

Criminal Procedure — Trial — Close of prosecution's case — Whether necessary for trial court to set out reasons for deciding to call on accused to enter upon defence — Whether sufficient for trial court merely to record that defence was being called and later explain in written judgment why that was done

The respondent was charged with an offence of trafficking a prescribed drug contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). After a brief review of the defence evidence, the trial judge concluded that the respondent had failed to rebut the presumption of trafficking. He accordingly entered a conviction on the basis of s 37(d) of the Act read with s 37(da) of the Act (double presumption) and sentenced the accused to death. The accused then appealed to the Court of Appeal.

The majority of the Court of Appeal held that this approach to the case by the learned trial judge amounted to a misdirection as it offended the ruling against double presumption in *Muhammed bin Hassan v PP* [1998] 2 MLJ 273. When the trial tried the respondent and handed down his decision, *Muhammed bin Hassan* was yet to be decided. The Court of Appeal therefore set aside the conviction for trafficking and substituted it with a conviction for a lesser offence of possession and imposed 18 years' imprisonment and ten strokes of whipping. The majority decision also commented that it was necessary for the trial court to set out its reasons for deciding to call on an accused to enter upon his defence. It was insufficient for a trial court merely to record the fact that the defence was being called and later in its written judgment to explain why that was done.

The learned deputy argued that this was a case in which the finding of the learned trial judge ought to be restored based on the evidence in the record of appeal. The learned deputy also relied on *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 in support of his submission.

Held, dismissing the appeal:

(1) *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 is not authority for the proposition that it is incumbent for a court to make a finding at the close of the prosecution's case that the court was satisfied that the prosecution had proved its case beyond reasonable doubt. The failure by the trial court either to make or to record such a finding does not occasion a miscarriage of justice. It is sufficient for the judicial arbiter — be he judge or magistrate — to give his reasons in his written grounds of judgment for requiring an accused to make his defence (see para 4).

(2) Where the prosecution seek to prove trafficking by relying on s 37(da), it must proven at the trial, all the ingredients of possession (see para 16); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 followed. The judgment of this court in *Muhammcd bin Hassan* had been handed down before the respondent's appeal against his conviction was heard by the Court of Appeal. It then became necessary for the Court of Appeal to apply *Muhammed bin Hassan* to this case. It is in this way that the declaration of the common law by a superior court operates retrospectively (see para 20); *National Westminster Bank plc v Spectrum Plus Ltd* [2005] UKHL 41 followed. Therefore the majority judgment was correct in applying *Muhammed bin Hassan* and in holding that the High Court had misdirected itself (see para 21).

(3) This court disagreed with the argument of the prosecution based on *Tunde Apatira* to restore the finding of the trial judge based on evidence in the record of appeal. First, the evidence that was relied on by the learned deputy was less than confidence inspiring (see para 22). In other words, the prosecution had failed to prove beyond a reasonable doubt that the respondent knew the nature of the thing possessed which is a vital element of the ingredient of possession in the presumption under s 37(da) (see para 23). Secondly, it is not the function of this court to make primary findings of fact (see para 27). *Tunde Apatira* was an exceptional case because it was a case where there were concurrent findings of fact on the issue of possession with mens rea (see para 28); *Tunde Apatira & Ors v PP* [2001] 1 MLJ 259 distinguished.

Per curiam:

The problem caused by the prosecution's failure to specify whether it proposed to prove actual trafficking or whether it proposed to rely on the presumption under s 37(da) of the Act is easily solved by the prosecution intimating to the defence and to the court at the first available opportunity if its case is one of actual trafficking or if it intends to rely on a presumption to establish trafficking and, if the latter be the case, to identify the precise presumption. This could be done either before the commencement of the trial or as part of the opening speech and would go a long way in assisting the

defence in directing its cross examination along appropriate lines and thereby avoiding a waste of the court's time (see paras 31 and 32).

[**Bahasa Malaysia summary**

Responden telah didakwa mengedar dadah tersenarai bertentangan dengan s39(B)(1)(a) Akta Dadah Berbahaya 1952 (Akta tersebut). Selepas kajian ringkas ke atas keterangan pembelaan, hakim bicara membuat kesimpulan bahawa responden telah gagal untuk menyangkal anggapan mengedar. Beliau dengan itu memasukkan sabitan berdasarkan s 37(d) Akta tersebut dibaca dengan s 37(da) Akta tersebut (anggapan berganda) dan menghukum tertuduh dengan hukuman mati. Tertuduh kemudiannya merayu ke Mahkamah Rayuan.

Majoriti Mahkamah Rayuan memutuskan bahawa pendekatan kes ini oleh hakim bicara yang arif adalah merupakan satu salah arah kerana ianya bertentang dengan keputusan berkenaan anggapan berganda dalam *Muhammed bin Hassan v PP* [1998] 2 MLJ 273. Apabila responden membicarakan responden dan memberi keputusannya, *Muhammed bin Hassan* masih belum diputuskan. Mahkamah Rayuan oleh itu telah mengenepikan sabitan ke atas kesalahan mengedar dan menggantikannya dengan sabitan bagi kesalahan yang lebih ringan iaitu milikan dan mengenakan hukuman penjara 18 tahun dan sepuluh kali sebatan. Keputusan majoriti juga menyatakan bahawa ianya perlu bagi mahkamah bicara untuk menyatakan alasan-alasan atas keputusan memanggil pihak tertuduh untuk memasuki pembelaan. Adalah tidak mencukupi bagi mahkamah bicara untuk hanya merekodkan fakta bahawa pembelaan telah dipanggil dan kemudiannya dalam penghakiman bertulis menerangkan kenapa ianya dilakukan.

Timbalan yang arif telah menghujankan bahawa ini adalah kes yang mana keputusan hakim bicara yang arif perlu dikekalkan berdasarkan keterangan yang terdapat dalam rekod rayuan. Deputy yang arif juga bergantung kepada *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 bagi menyokong hujahnya.

Diputuskan, menolak rayuan itu:

(1) *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 bukanlah satu autoriti bagi usul untuk menyatakan bahawa adalah wajib bagi mahkamah untuk membuat keputusan pada penutupan kes pendakwa bahawa mahkamah telah berpuas hati bahawa pendakwa telah membuktikan kesnya di luar keraguan yang munasabah. Kegagalan mahkamah bicara sama ada untuk membuat atau merekodkan keputusan tersebut tidak menyebabkan salah laksana keadilan. Adalah mencukupi bagi seorang penentu kehakiman — sama ada hakim atau majistret — untuk memberikan sebabnya dalam alasan penghakiman bertulis kerana menghendaki tertuduh untuk membuat pembelaannya (lihat perenggan 4).

(2) Apabila pihak pendakwaan mahu membuktikan pengedaran dengan bergantung kepada s 37(da), ia perlu dibuktikan semasa perbicaraan, kesemua ciri-ciri milikan (lihat perenggan 16); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 diikut. Penghakiman mahkamah ini dalam *Muhammcd bin Hassan* telah diberikan sebelum rayuan defendan terhadap sabitannya didengar oleh Mahkamah Rayuan. Oleh itu, ia kemudiannya menjadi perlu bagi Mahkamah Rayuan untuk menggunapakai *Muhammed bin Hassan* ke atas kes ini. Dengan cara inilah deklarasi common law oleh mahkamah yang lebih tinggi beroperasi secara retrospektif (lihat perenggan 20); *National Westminster Bank plc v Spectrum Plus Ltd* [2005] UKHL 41 diikut. Oleh itu penghakiman majoriti adalah betul dalam menggunapakai *Muhammed bin Hassan* dan membuat keputusan bahawa Mahkamah Tinggi telah tersalah arah (lihat perenggan 21).

(3) Mahkamah ini tidak bersetuju dengan hujah pihak pendakwa yang berdasarkan *Tunde Apatira* untuk mengekalkan keputusan hakim berdasarkan keterangan dalam rekod rayuan. Pertama, keterangan yang diguna oleh timbalan yang arif adalah kurang meyakinkan (lihat perenggan 22). Dengan kata lain, pendakwa telah gagal untuk membuktikan di luar keraguan yang munasabah bahawa responden mengetahui sifat benda yang dimilikinya yang merupakan elemen yang penting bagi ciri milikan dalam anggapan di bawah s 37(da). Kedua, bukanlah fungsi mahkamah ini untuk membuat keputusan utama bagi fakta (lihat perenggan 27). *Tunde Apatira* adalah kes yang terkecuali kerana ia adalah kes yang mempunyai pendapat yang berlainan dalam masa yang sama berkenaan fakta atas isu milikan dengan mens rea (lihat perenggan 28); *Tunde Apatira & Ors v PP* [2001] 1 MLJ 259 dibezakan.

Per curiam:

Masalah yang diakibatkan oleh kegagalan pihak pendakwa untuk menyatakan dengan terperinci sama ada ia bercadang untuk membuktikan pengedaran sebenar atau bercadang untuk bergantung kepada anggapan di bawah s 37(da) Akta tersebut dengan mudah boleh diselesaikan dengan pendakwa memberi tanda-tanda kepada pembelaan dan kepada mahkamah pada peluang pertama sekiranya kesnya adalah berkenaan pengedaran sebenar atau ia berniat untuk bergantung kepada anggapan untuk membuktikan pengedaran dan, sekiranya ianya berkenaan yang kemudiannya, untuk mengenalpasti anggapan yang tepat. Ini boleh dilakukan sama ada sebelum bermulanya perbicaraan atau sebagai sebahagian ucapan pembukaan dan seterusnya membantu pihak pembelaan bagi menghala pemeriksaan balasnya pada hala yang sepatutnya dan oleh itu mengelakkan pembaziran masa mahkamah (lihat perenggan 31 dan 32).]

Notes

For cases on appeal generally, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 135–692.

For cases on close of prosecution's case, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 4288–4329.
For cases on finding of fact, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 362–433.

Cases referred to

Abdillah bin Labo Khan v PP [2002] 3 MLJ 298 (refd)
Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (folld)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217 (refd)
Linkletter v Walker (1965) 381 US 618 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
Mat v PP [1963] MLJ 263 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)
National Westminster Bank plc v Spectrum Plus Ltd [2005] UKHL 41 (folld)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1 (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311 (refd)
PP v Kasmin bin Soeb [1974] 1 MLJ 230 (refd)
PP v Okonkwo & Anor [1993] 3 SLR 610 (refd)
Saad Ibrahim v PP [1968] 1 MLJ 158 (refd)
Tai Chai Keh v PP [1948-49] MLJ Supp 105 (refd)
Toh Ah Loh & Mak Thim v Rex [1949] MLJ 54 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259 (distd)
Yap Chai Chai & Anor v PP [1973] 1 MLJ 219 (refd)

Legislation referred to

Courts of Judicature (Amendment) Act 1995 s 17
Courts of Judicature Act 1964 s 92(1)
Criminal Procedure Code ss 173(f), 180
Dangerous Drugs Act 1952 ss 6, 37(d), (da), 39B(1)(a), (2). 39A(2),

Appeal from: Criminal Appeal No R–05–3 of 1994 (Court of Appeal, Kuala Lumpur)

Mohamad Hanafiah Zakaria (Nik Azmi bin Nik Abdullah with him) (Senior Federal Counsels) for the appellant.
M Athimulan (Dev Kumaraendran) (Kumar & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The respondent before us was charged with an offence of trafficking a prescribed drug contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. He was convicted of that

offence by the High Court on 21 July 1994 and sentenced to death. He then appealed to the Court of Appeal. That court by a majority (KC Vohrah JCA dissenting) reversed the High Court and set aside the sentence of death. However, it convicted the appellant of the lesser offence of possession under s 39A(2) of the Act. A sentence of 18 years imprisonment from the date of arrest and ten strokes of whipping was imposed on the respondent. The prosecution being dissatisfied with the decision appealed to this court. Before we address the appeal on its merits, there is a matter that needs to be dealt with.

[2] In the course of their separate judgments, the majority (Mokhtar Sidin JCA and Faiza Tamby Chik J) made certain observations with which we are unable to agree. It has to do with the duty of a trial judge, who, at the close of the prosecution case, decides to call upon an accused to make his defence to a charge. According to the majority it is necessary in such a case for the trial court to set out its reasons for deciding to call on an accused to enter upon his defence. It is insufficient for a trial court merely to record the fact that the defence was being called and later in its written judgment to explain why that was done. The decision of this Court in *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 was relied upon in support of this proposition since the present instance was a case decided before the amendments to the Criminal Procedure Code ('CPC'). With respect, we are unable to agree with the majority view.

[3] The point that found favour with the majority is one that has already been traversed by high authority. In *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219. the trial judge did not enter on the record his opinion that there was a case to answer before leaving the case to the jury. A complaint that this rendered the trial a nullity found no favour with the court. Similarly, in *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217, the Supreme Court rejected an argument in a case tried by a judge sitting alone. Both these cases are referred to in some detail in the dissenting judgment of KC Vohrah JCA and we find no reason to regurgitate them. Suffice to say that the effect of those cases has not been eroded by the decision in *Arulpragasan*.

[4] In our respectful view, *Arulpragasan* is authority for the proposition that the test to be applied under the former ss 173(f) and 180 of the CPC is that the prosecution must establish its case beyond a reasonable doubt before an accused could be called upon to enter his defence. It is not authority for the proposition that it is incumbent for a court to make a finding at the close of the prosecution's case that he was satisfied that the prosecution had proved its case beyond reasonable doubt. The failure by the trial court either to make or to record such a finding does not in our judgment occasion a miscarriage of justice. It is sufficient for the judicial arbiter — be he judge or magistrate — to give his reasons in his written grounds of judgment for requiring an accused to make his defence.

[5] After the amendments to ss 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a subordinate court and the High Court under the amended sections is to call for the defence when it is satisfied that a *prima facie* case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See *Tai Chai Keh v Public Prosecutor* [1948-49] MLJ Supp 105: *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under ss 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

[6] In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 63. Augustine Paul J described what a *prima facie* case is in the following terms:

> A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.

[7] The judgment in that case was subjected to scrutiny both by the Court of Appeal and this court. See [2000] 2 MLJ 486 and [2002] 3 MLJ 193. Neither

court criticised the above quoted passage as being an incorrect interpretation of s 180 of the CPC. Further, the Court of Appeal in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 expressly approved and preferred the test in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* to the test formulated in the other cases decided by the High Court. As such, we have no hesitation in affirming the test formulated by the Court of Appeal in *Looi Kow Chai*.

[8] For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:

(i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a *prima facie* case has been made out and the defence should be called. If the answer is 'No' then, a *prima facie* case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263.

[9] In the present case, the evidence led by the prosecution is as follows. On 20 December 1991 at about 2pm. Superintendent of Customs Mohd Pudzi ('PW2') briefed his men and divided them up into three groups. On his instructions, the first group took position near Malayan Banking Padang Besar, while the second group took position near the Padang Besar mosque. The third group led by PW2 took position in front of Taman Imigresyen, Padang Besar. At about 2.30pm, PW2 received a call on his walkie-talkie from one of his officers, Abdul Rahman, a member of the first group. Abdul Rahman told PW2 that he had spotted what he suspected to be motor cycle number PBE 8922 outside a shop called 'Khoon Teng' which was in the same row of shops as Malayan Banking. About an hour later, at about 3.30pm, PW2 received another call from Abdul Rahman, this time informing him that two males had approached the target motorcycle and mounted it. PW2 was given a brief description of the two men. About five minutes later, PW2 saw the target motorcycle overtaking a lorry and proceeding from the direction of

Padang Besar towards Kangar. At that point, PW2 and another customs personnel, Shariffudin, walked up to the centre white line on the road. Shariffudin held up a sign that read 'Stop Customs' ('Berhenti Kastam'). PW2 then noticed that the target motorcycle was no longer overtaking the lorry. As the lorry passed PW2 and Shariffudin, PW2 saw the motorcycle make a 'U turn' and head back to Padang Besar. At the same time the pillion rider of the motor cycle leapt from the motorcycle and began to run away. After a short pursuit, both the rider, the respondent, and the pillion rider, Saiful, were apprehended. Four packages were recovered from the respondent. They were found to contain a substance, which on subsequent examination by the chemist ('PW1'), was found to be 342.1 grams of cannabis. Later, the respondent was, as we have said at the commencement of this judgment, charged with an offence under s 39B(1)(a) of the Act, convicted and sentenced to death.

[10] The notes of evidence recorded by the learned judge include the submissions of both the deputy public prosecutor and defence counsel. However, there is nothing in those notes to indicate the basis on which the prosecution was seeking a conviction of the respondent. There is no note of a submission that the prosecution was relying on the evidence as establishing a case of actual trafficking. Neither is there any note of a submission that the prosecution was relying on the presumption of trafficking under s 37(da) of the Act. However, what is amply clear from the judgment of the learned judge is that he convicted the respondent on the basis of s 37(d) of the Act read with s 37(da) of the Act. In other words, he first held the respondent to be in presumed possession of the prescribed drug within s 37(d) of the Act and then proceeded to hold that such possession was sufficient to raise the presumption of trafficking under s 37(da) of the Act. After a brief review of the defence evidence, he concluded that the respondent had failed to rebut the presumption of trafficking. He accordingly entered a conviction.

[11] The majority of the Court of Appeal in the present case held that this approach to the case by the learned trial judge amounted to a misdirection. That court therefore set aside the conviction for trafficking under s 39B(2) and substituted it with a conviction under s 6 and punishable under s 39A(2) of the Act. It also set aside the sentence of death and instead imposed 18 years' imprisonment from the date of arrest and ten strokes of whipping.

[12] In his judgment, Mokhtar Sidin JCA, took the view that it offended the principle laid down in the decision in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. That principle has come to be known as the rule against double presumptions or the rule against a presumption upon a presumption. The principle is simply this. The presumed possession under s 37(d) of the Act is not the 'possession' referred to in s 37(da) of the Act. The phrase 'found in possession' in s 37(da) refers to actual possession. Hence, where the prosecution intends to rely on the presumption under s 37(da), it is necessary for it to prove by positive evidence — and not by the presumption under

s37(d) — all the ingredients of possession in law. If there is a failure to prove those ingredients, then the prosecution would fail to establish a case of trafficking through the vehicle of s 37(da).

[13] Now, as to what the ingredients of possession in law has been established by a long line of cases. We find it unnecessary to discuss all of them here. Suffice that we refer to two of them. In *Toh Ah Loh & Mak Thim v Rex* [1949] MLJ 54. Gordon- Smith Ag CJ when delivering judgment of the Singapore Court of Appeal explained the meaning in law of the word 'possession' when appearing in a statute. His lordship said:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing. If these factors are absent, his possession can raise no presumption of *mens rea*, without which (except by statute) possession cannot be criminal.

[14] The second is *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158 where Yong J stressed the necessity of establishing the ingredient of knowledge on the part of an accused before he could be incriminated with possession. His Lordship there said:

> In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it.Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

[15] We would also mention the learned judgment of Lim Beng Choon J in *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, which contains a full discussion of the several cases on the point.

[16] We accept these authorities as correctly stating the law. It follows that where the prosecution seek to prove trafficking by relying on s 37(da), it must to prove at the trial, all the ingredients of possession set out in the cases of *Toh Ah Loh* and *Mak Thim* and *Saad Ibrahim*.

[17] That brings us to the instant appeal. Here, the direction by the High Court in its judgment is not in accordance with *Muhammed bin Hassan*. That is through no fault of the learned judge. His decision in the present case was handed down long before *Muhammed bin Hassan* was decided. But a decision of this court — or indeed of any court — is retrospective in effect unless a specific direction of prospectivity is expressed.

[18] As was stated by the Court of Appeal in its judgment in *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298 at p 304:

It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect. In the United States, in respect of constitutional matters, that is to say, where a statute is declared unconstitutional, the power to declare such a ruling to be prospective only was asserted in 1965 in the case of *Linkletter v Walker* (1965) 381 US 618 (at p 628). That principle has been adopted into our jurisprudence in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, where at pp 320–321, Abdoolcader SCJ said:

> The general principle of retroactivity of a judicial declaration of invalidity of a law was overturned by the Supreme Court of the United States of America in Linkletter v Walker (1965) 381 US 618 (at p 628) when it devised the doctrine of prospective overruling in the constitutional sphere in 1965 as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality. This doctrine was applied by the Supreme Court of India in *LC Golak Nath v State of Punjab & Anor* AIR 1967 SC 1643 (at pp 1666-1669). The doctrine — to the effect that when a statute is held to be unconstitutional, after overruling a long standing current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionally so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions or acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed — can be applied by the Supreme Court as the highest court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit to be moulded hi accordance with the justice of the cause or matter before it — to be adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.
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> In England, this doctrine has been recognised by the House of Lords by necessary implication in the *Practice Statement (Judicial Precedent)* Vol 123 DLR (Third) 554issued by Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on 26 July 1966. More recently, in *Jones v Secretary of State for Social Services* [1972] AC 944, two judges of the House of Lords, Lord Diplock (at p 1015) and Lord Simon of Glaisdale (at p 1026) were prepared to consider the application of the American doctrine of prospective overruling to England. In *Choice Investments Ltd v Jeromnimon* [1981] 2 WLR 80, Lord Denning MR in his judgment in the English Court of Appeal (at p 84) accepted the subsistence and application of the doctrine. In *Defrenne v Sabena* [1981] 1 All ER 122, the Court of Justice of the European Communities applied the doctrine of prospective overruling predicated on conditions of legal certainty which required the court, as an exceptional measure, to declare the law for the future only.

Although *Linkletter v Walker* and *PP v Dato' Yap Peng* concerned the constitutionality of statutes, the same principle applies to decisions in other areas of the law. This appears sufficiently from the cases of *Jones v Secretary of State for Social Services and another appeal* [1972] AC 944 and *Choice Investments Ltd v Jeromnimon and another appeal* [1981] 2 WLR 80, both of which are referred to in the passage above quoted.

The Federal Court could, therefore, if it had so wished, have declared its decision in *Muhammed bin Hassan* to be of prospective effect only. Had it done so, then cases decided under the former misconception about the way in which ss 37(d) and (da) of the Act were to be applied would not have been available for correction on appeal. But that is not what happened. The decision in *Muhammed bin Hassan* consequently falls under the general doctrine of retrospectivity and it therefore applies to the present case. We therefore are bound to apply it.

[19] Very recently, the House of Lords has had to consider the doctrine of prospective overruling in *National Westminster Bank plc v Spectrum Plus Ltd* [2005] UKHL 41. The House was agreed that it had the power to overrule prospectively. Lord Nicholls of Birkenhead explained the operation of prospective overruling in terms which are relevant to the instant appeal. He said:

A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned, as occurred with the manufacturer of the ginger beer in *Donoghue v Stevenson* [1932] AC 562. When Mr Stevenson manufactured and bottled and sold his ginger beer the law on manufacturers' liability as generally understood may have been as stated by the majority of the Second Division of the Court of Session and the minority of their Lordships in that case. But in the claim Ms Donoghue brought against Mr Stevenson his legal obligations fell to be decided in accordance with Lord Atkin's famous statements. Further, because of the doctrine of precedent the same would be true of everyone else whose case thereafter came before a court. Their rights and obligations would be decided according to the law as enunciated by the majority of the House of Lords in that case even though the relevant events occurred before that decision was given.

People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences. 'Prospective overruling', sometimes described as 'non-retroactive overruling', is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for court rulings on points of law which, to greater or lesser extent, are designed not to have the normal retrospective effect of judicial decisions.

Prospective overruling takes several different forms. In its simplest form prospective overruling involves a court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the court ruling has an exclusively prospective effect. The ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date continue to be governed by the law as it was conceived to be before the court gave its ruling.

Other forms of prospective overruling are more limited and 'selective' in their departure from the normal effect of court decisions. The ruling in its operation may be prospective and, additionally, retrospective in its effect as between the parties to the case in which the ruling is given. Or the ruling may be prospective and, additionally, retrospective as between the parties in the case in which the ruling

was given and also as between the parties in any other cases already pending before the courts. There are other variations on the same theme.

[20] So too here. When the learned judge at first instance tried the respondent and handed down his decision, *Muhammed bin Hassan* was yet to be decided. However, the judgment of this court in *Muhammed bin Hassan* had been handed down before the respondent's appeal against his conviction was heard by the Court of Appeal. It then became necessary for the Court of Appeal, in accordance with the principles adverted to by Lord Nicholls in *Spectrum Plus*, to apply *Muhammed bin Hassan* to this case. It is in this way that the declaration of the common law by a superior court operates retrospectively.

[21] In our judgment, Mokhtar Sidin JCA, speaking for the majority, was therefore correct in applying *Muhammed bin Hassan* and in holding that the High Court had misdirected itself. But that is not the end of the matter. The learned deputy who appeared before us argued that this is a case in which the finding of the learned trial judge ought to be restored based on the evidence in the record of appeal. This was the course adopted by KC Vohrah JCA in his minority judgment and we were urged to follow suit. Much reliance was also placed by the learned deputy on the judgment of this court in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 in support of his submission. With respect, there are three reasons why we find ourselves unable to agree with the submissions of the learned deputy.

[22] First, the evidence that is relied on by the learned deputy is less than confidence inspiring. The two main pieces of evidence relied on by him are the flight of the respondent from the scene and the finding of the four wrapped packages on his person. But, as pointed out by the learned President of the Court of Appeal (now Chief Justice) to the learned deputy during the course of argument, both these circumstances, even when taken together, do not go to prove trafficking. As to flight, it must be borne in mind is this is not by itself proof of a guilty mind. The point has been made more than once and we find it sufficient to quote the following passage in the judgment of Edgar Joseph Jr SCJ in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 at p 9:

> An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It is true that the appellant himself denied running away but we agree with the judge that the appellant lied on this point, but this does not preclude us from drawing such inferences as may be justified from the evidence adduced by the prosecution. The Jamaican Privy Council case of *DPP v Brooks* [1974] 2 All ER 840, cited to us by the learned deputy public prosecutor, where the accused, who occupied the driver's seat of a stationary van which contained more than 1000 lbs of ganja, together with several others in the van, scrambled out and ran off, when police officers hurried towards the van, is, therefore, readily distinguishable.

[23] When the recovery of the packages is taken together with the evidence of flight, two inferences are reasonably possible. Either the respondent knew

that the packages contained cannabis in excess of the statutory minimum or he thought that they contained some other contraband goods. In those circumstances, the established principle is that the inference most favourable to the respondent must be drawn. In other words, the prosecution had failed to prove beyond a reasonable doubt that the respondent knew the nature of the thing possessed which is a vital element of the ingredient of possession in the presumption under s 37(da). This point was squarely put by the learned Chief Justice to the learned deputy during argument but no response was forthcoming.

[24] We were then invited by the learned deputy to make our own findings on the evidence and to restore the conviction entered by the learned trial judge on the basis of the proviso to s 92(1) of the Courts of Judicature Act 1964. Reliance was placed on the decision of this Court in *Tunde Apatira*.

[25] Now, it settled law that it is no part of the function of an appellate court in a criminal case — or indeed any case — to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.

[26] The further principle established by this court in *Muhammed bin Hassan v Public Prosecutor* is that where s 37(da) is relied on by the prosecution, it is for the trial court to make a specific finding that the accused was hi possession in the legal sense. In the absence of such a finding, it is not open to an appellate court to fill the gap and make the finding. A suggestion by counsel for the prosecution that this court in entitled to make its own findings of fact was firmly rejected. In that case Chong Siew Fai CJ (Sabah & Sarawak) said (at p 292):

> As regards the alternative submission of the learned deputy public prosecutor that, independently of s 37(d), there was sufficient evidence of possession of the cannabis on the part of the appellant, all we need to say is that on the evidence, the learned trial judge did not make a finding of possession (ie possession as understood in criminal law) either factually or by way of inference. We, at the appellate stage, not having had the opportunity of observing the witnesses in giving evidence, did not consider it appropriate and safe to arrive at any conclusion in this regard.

[27] Now, *Muhammed bin Hassan* was a case of a first appeal from the High Court to this court exercising the powers of the former Supreme Court under s 17 of the Courts of Judicature (Amendment) Act 1995 (Act A909). If the principle adverted to a moment ago holds good in a first appeal, it applies with greater force in a second appeal. To put the matter beyond any doubt, we state that it is not the function of this court to make primary findings of fact. Of course, we may examine the record to see if the trial court drew the proper inferences from proved or admitted facts. But is quite a different principle and has no application to the present instance.

[28] We now turn to the invitation to apply the proviso on the basis that it was done in *Tunde Apatira*. That case discussed some of the authorities in which the proviso was considered. *Tunde Apatira* was an exceptional case and this court said so in its judgment. It was an exceptional case because the totality of the evidence at the trial in that case reasonably supported the conclusion that the appellants were in 'possession with *mens rea*' — the expression used by Lim Beng Choon J in *Badrulsham bin Baharom* which we approve — of the proscribed drug at the material time. Further, the facts as found by the trial judge in that case were affirmed by the Court of Appeal. Thus, it was a case where there were concurrent findings of fact on the issue of possession with *mens rea*. In accordance with well established principles, this court does not interfere with concurrent findings of fact. The only point argued in *Tunde Apatira* was the correctness of the decision in *Muhammed bin Hassan*. And this court re-affirmed its decision in that case. On the basis of the concurrent findings of fact in that case, no miscarriage of justice was occasioned to the accused in applying the proviso. As happens in many criminal cases, *Tunde Apatira* was a case decided on its own peculiar facts. Counsel on both sides of the Bar are therefore discouraged from treating it as laying down any new principle.

[29] With respect, it is here, in our view that Vohrah JCA fell into error. For, his minority judgment when read as whole, does, with respect, make findings not made by the learned trial judge. Further, we are also respectfully of the view that the dissent fails to appreciate the exceptional circumstances of *Tunde Apatira* to which we have already drawn attention.

[30] For these reasons, we must regretfully decline the invitation of learned deputy to make our own findings of fact and to apply the proviso.

[31] Before we conclude, there is one final matter that requires mention. In the present case, the application by the learned trial judge of the double presumption formula appears in the main to have been caused by the prosecution's failure to specify whether it proposed to prove actual trafficking or whether it proposed to rely on the presumption under s 37(da) of the Act. We find this a common occurrence in prosecutions for trafficking under the Act. Trial judges and defence counsel are most often left guessing until the very end of the trial as to whether the prosecution is relying on direct evidence to prove trafficking or whether they seek to rely on the presumption under ss 37(d) or 37(da) of the Act.

[32] In our view, the problem is easily solved by the prosecution intimating to the defence and to the court at the first available opportunity if its case is one of actual trafficking or if it intends to rely on a presumption to establish trafficking and, if the latter be the case, to identify the precise presumption. This could be done either before the commencement of the trial or as part of the opening speech and would go a long way in assisting the defence in directing

its cross examination along appropriate lines and thereby avoiding a waste of the court's time. See *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, applying *Public Prosecutor v Okonkwo & Anor* [1993] 3 SLR 610.

[33] In conclusion, we find ourselves in agreement with and uphold the order of the majority of the Court of Appeal both in respect of the conviction entered and the sentence passed.

Appeal dismissed.

Reported by Loo Lai Mee